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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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PATENT DEPARTMENT  
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EXAMINER

HENDRICKS, KEITH D

ART UNIT PAPER NUMBER

1761

DATE MAILED: 06/25/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

09/880,199

Applicant(s)

VERRIPS, CORNELIS  
THEODORUS

Examiner

Keith Hendricks

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-11 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-11 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

### Priority under 35 U.S.C. §§ 119 and 120

- 13) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

### Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 2,4.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

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## DETAILED ACTION

### *Claim Rejections - 35 USC § 112*

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-8 are rejected under 35 U.S.C. 112, second paragraph, as being incomplete for omitting essential steps, such omission amounting to a gap between the steps. See MPEP § 2172.01. The phrase "are added in such a way", does not set forth any positive, active method step(s), regardless of the resultant outcome of the intended process. One skilled in the art would not be able to arrive at said outcome, without sufficient description of the essential step(s) involved. The method steps generally described in (any one of) claims 3,4 and 7, are suggested to be incorporated into the dependent claim, if also amended to set forth a positive, active protocol.

The phrase "health-active", as it appears in claim 2, is indefinite. It is unclear in what organism the bacteria are to be active, and to what effect, such that they would be considered "health-active."

In claims 3-5 and 7, the term "involving" (or "involves") is indefinite. It is unclear if this is an actual method step of the claimed process, or if this is somehow remotely related, i.e. 'involved', but not part of the claimed process. It is suggested that the term "comprising" (or "comprises") be utilized in place of the rejected term.

Claim 6 is indefinite for the recitation of an improper Markush-type group. It is suggested that the recited food products be listed in the format of "*selected from the group consisting of...[a, b, c] and [d].*"

Claim 6 is also indefinite for the recitation of the following terms: "meal replacers", "snacks", "other bakery products", "sweets", and "bars." The metes and bounds of the claimed invention are not clear, as it is unclear as to what is (and is not) encompassed by these terms. These terms are generally broad and non-specific to any particular type of food product, such that one skilled in the art would be apprised of the scope of the invention.

Regarding claim 8, the phrases "more preferred" and "most preferred", render the claim indefinite because it is unclear whether the limitations following the phrase are part of the claimed invention. See MPEP § 2173.05(d).

In product claims 9-11, it is suggested that a comma ( , ) be inserted after the phrase "or less" (claim 9, line 1), and "or more" (claims 10-11, line 1).

*Claim Rejections - 35 USC § 102*

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-8 and 10-11 are rejected under 35 U.S.C. 102(b) as being anticipated by Hutkins et al. (US PAT 5,186,962, of record).

Hutkins et al. disclose a composition and method for inhibiting spoilage microorganisms in food products. The method comprises the addition of "live cells of non-fermenting and/or non-growing lactic acid bacteria", to food products. The bacteria are capable of producing microbial-inhibiting bacteriocins, "under conditions of non-growth and non-fermentation" (abstract). The referenced method specifically avoids the fermentation of the food product by said lactic acid bacteria (disclosed as including *Lactobacillus* strains). One method embodied by the reference, meeting instant claim 3, comprises the addition of non-viable (i.e. non-growing, non-fermenting) lactic acid bacteria to various food products, including raw foods or processed foods, such as hot dogs and sausages, ice cream, cottage cream, or "any food substance for which inhibition of food spoilage and/or foodborne pathogens is desired" (col. 10). A second embodiment involves the addition of viable lactic acid bacteria, followed by the inhibition of growth/fermentation by various means, including maintaining the food product at refrigeration temperatures, or the addition of fermentation-inhibiting substances, such as sodium chloride, antioxidants, emulsifiers, etc. (col. 10). This is also accomplished by utilizing a food substance which lacks a nutrient "required for fermentation and/or metabolism by the lactic acid bacteria" (top, col. 11). This meets the limitations of instant claim 4. The examples demonstrate the production of frankfurters and sausages, which "involve a heat-treatment step for preparation or preservation of the food product" (instant claim 5), namely, the smoking/curing of these products at elevated temperatures. The addition of "live cells of non-fermenting and/or non-growing lactic acid bacteria" thus meets the limitation of instant claim 7. Further, the reference states that the cell count of the lactic acid bacterial population should preferably not increase by more than 10-50%, thus ensuring that the number of non-viable (i.e. non-growing) bacteria will outnumber the viable bacteria by "more than 2:1" (instant claim 8). Finally, the pH of the foods is preferred to be in the range of 5-7 (col. 6).

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*Conclusion*

Note: The product of claim 9 is allowable over the prior art of record. Initially, "food products having a pH of 3.8 or less" generally fall into the category of soda-type beverages, and citrus juices such as orange and lemon juice. These are produced by either the addition of acid directly to the composition, or through the natural act of the fruit from which the juice is made. Any food which has been fermented to a pH of 3.8 or less, would be rare, and would still be expected to contain the fermenting lactic acid bacteria. There is no motivation, then, to further include a "non-viable *Lactobacillus* bacteria" in any such food products, where such food products were not first fermented by said "non-viable *Lactobacillus* bacteria".

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Keith Hendricks whose telephone number is (703) 308-2959. The examiner can normally be reached on M-F (8:30am-6pm); First Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703) 308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9310 for regular communications and (703) 872-9565 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.



**KEITH HENDRICKS  
PRIMARY EXAMINER**